

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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OLYMPIA CANNING COMPANY, a Corpora-  
tion,

Plaintiff in Error,

vs.

THE UNION MARINE INSURANCE, LTD., a  
Corporation,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of  
the Western District of Washington, Northern Division.

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FILED

SEP 29 1925

F. D. MONCKTON,  
CLERK



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Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. BOGLE, BOGLE & HOLMAN, Attorneys  
for Plaintiff in Error,  
609-16 Central Building, Seattle, Wash-  
ington.

Messrs. SHORTS & DENNY, Attorneys for De-  
fendants in Error,  
908 Alaska Building, Seattle, Washing-  
ton. [1\*]

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In the Superior Court of the State of Washington  
for King County.

No. 172,142.

OLYMPIA CANNING COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

THE UNION MARINE INSURANCE COM-  
PANY, LIMITED, a Corporation,

Defendant.

COMPLAINT.

Comes now the Olympia Canning Company, a  
corporation, plaintiff herein, and for its cause of  
action against the defendant herein alleges as fol-  
lows:

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\*Page-number appearing at foot of page of original certified Tran-  
script of Record.

**I.**

That Olympia Canning Company, plaintiff herein, is and at all times hereinafter mentioned has been, a corporation, organized and existing under the laws of the State of Washington, with its principal place of business in the city of Olympia, Washington; that it has paid all fees due the State of Washington, including its last annual license fee.

**II.**

That defendant, The Union Marine Insurance Company, Limited, is and at all times hereinafter mentioned has been, a corporation, created and existing under the laws of the United Kingdom of Great Britain, with its principal office in the city of Liverpool; that it has complied with all the requirements of the insurance code of the State of Washington, and is privileged to sue, and subject to be sued, in the State of Washington under [2] and by virtue of the provisions of said state insurance code. That H. O. Fishback, State Insurance Commissioner of the State of Washington, is under the laws of said State of Washington, the duly authorized agent and attorney-in-fact of said defendant in said State of Washington, upon whom service of process can be made, with the same force and effect as service upon the defendant itself.

**III.**

That on the 8th day of June, 1922, the defendant, by its duly authorized agents, Drage-Graessner Co., entered into a contract of insurance with the plaintiff, being Open Policy No. 120 of said defendant

company, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof; that the original contract of insurance between plaintiff and the defendant, dated June 8th, 1922, was subsequently modified by endorsements therein dated August 4, 1922, June 10, 1922, and October 28, 1922, copy of which endorsements are attached hereto, marked respectively Exhibits "B," "C" and "D," and made a part hereof; that by virtue of the terms of said contract of insurance, the defendant, in consideration of payment by plaintiff of the premiums at the rates therein stated, agreed to and did insure said plaintiff against loss of cannerly supplies of every description and/or canned goods from Seattle to Olympia, Washington, and way ports and *vice versa*, on and after June 8, 1922, upon vessels operated by Sound Freight Lines, Inc., and/or Merchants Transportation Co., and/or P. S. Navigation Co., and/or any vessels operated by Captain F. E. Lovejoy; liability on any one vessel not to exceed the sum of Fifteen Thousand Dollars (\$15,000.00), and by the endorsement dated October 28, 1922, attached hereto marked Exhibit "D," such liability was reduced to one-half interest in the plaintiff's goods on any one steamer, not to exceed Seven Thousand Five Hundred Dollars (\$7,500.00). [3]

#### IV.

That among other provisions in the policy it was provided:

"And touching the Adventures and Perils which the said Company is contented to bear

and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men of War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Suprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof.”

#### V.

That the contract of insurance hereinabove referred to was what is commonly known as an open policy of insurance, covering all shipments of the plaintiff from Seattle to Olympia, Washington, and *vice versa*, during the term of said policy, such shipments to be declared from time to time by the plaintiff to the defendant at their invoice value, and upon such declaration being made, to be covered by the terms of said contract of insurance.

#### VI.

That on or about the 29th day of September, 1923, and while said contract of insurance was in full force and effect, the plaintiff herein shipped on board the S. S. “Rubaiyat,” operated by Captain F. E. Lovejoy, 1500 cases of canned goods, of the invoice value of \$6,625.00, for transportation and carriage upon said vessel from Olympia, Washington, to Seattle, Washington, to be there delivered

to Anderson & Miskin, and that said plaintiff promptly declared one-half the value of said shipment, or \$3,312.50, to the defendant herein, being the amount at risk covered by the contract of insurance hereinabove referred to.

That on or about the 29th day of September, 1923, the said [4] plaintiff shipped on board said S. S. "Rubaiyat" 150 cases of canned goods, of the invoice value of \$600.00, for transportation and carriage from Olympia, Washington, to Seattle, Washington, and there to be delivered to Griffith & Dunney Co., and plaintiff promptly declared one-half of said shipment, or \$300.00, to the defendant, being the amount at risk covered by the policy hereinabove referred to.

That on September 29th, 1923, the plaintiff shipped on board said S. S. "Rubaiyat" 303 cases of Canned Goods, of the invoice value of \$1,218.00, for transportation and carriage on said vessel from the port of Olympia, Washington, to Seattle, Washington, and there to be delivered to Fisher Brothers, and plaintiff promptly declared one-half of said shipment, or \$609.00, to the defendant herein, being the amount at risk covered by the policy hereinabove referred to.

## VII.

That at the time said S. S. "Rubaiyat" took said goods on board, and at the time said vessel sailed from the port of Olympia, she was in every respect seaworthy for a voyage from Olympia, Washington, to Seattle, Washington; that during the course of said voyage, said vessel, without any fault or neg-

lect on the part of the plaintiff herein, sunk, and together with her cargo, became a total loss. That by reason of the sinking of said vessel, the cargo on board thereof belonging to the plaintiff herein, and more particularly specified in the preceding paragraph hereof, became a total loss by reason of the perils specified in the contract of insurance hereinabove referred to.

### VIII.

That plaintiff has made repeated demands of the defendant [5] for the payment of one-half of the invoice value of said goods lost as aforesaid, amounting to \$4,221.00, but the said defendant has failed, neglected and refused to pay said sum, or any part thereof, to the plaintiff herein, contrary to the terms of its contract of insurance with plaintiff.

WHEREFORE, plaintiff prays for judgment against the defendant in the sum of Four Thousand Two Hundred Twenty-one Dollars (\$4,221.00), together with interest thereon from the date of the loss of said goods, as aforesaid, and its costs and disbursements herein to be taxed.

BOGLE, MERRITT & BOGLE,  
Attorneys for Plaintiff. [6]

State of Washington,  
County of King,—ss.

Lawrence Bogle, being first duly sworn, on oath, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

That he makes this verification for the reason that there is no officer of said plaintiff present within the county of King, State of Washington.

LAWRENCE BOGLE.

Subscribed and sworn to before me this 26th day of January, 1924.

[Seal]

R. C. MILLER,

Notary Public in and for the State of Washington,  
Residing at Seattle. [7]

EXHIBIT "A."

THE UNION MARINE INSURANCE COMPANY, LIMITED.

OPEN POLICY

No. 120.

WHEREAS it has been proposed to the Union Marine Insurance Company, Limited, by Olympia Canning Company as well in their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this Policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described. Now this Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of as may be come due as a premium at and after the rate of as per contract attached per cent. for such insurance the said Company takes upon itself the burthen of such insurance to the amount of as per contract attached and promises and agrees with the Insured

their Executors Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in the Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from as per contract attached

Particular average payable if amounting to three per cent; each shipping package to be considered as if separately insured. JAG.

In case of loss or damage to any part of a machine consisting when complete for sale or use of several parts this Company shall only be liable for the insured value of the part so lost or damaged and amounting to a claim under this contract. JAG.

AND it is also agreed and declared that the subject matter of this Policy as between the Insured and the Company so far as it concerns this Policy shall be and is as follows upon as per contract attached

Deck load is warranted free from Particular Average unless directly resulting from stranding, sinking, burning or collision with another ship or vessel; but including risk of jettison and washing overboard, irrespective of percentage. JAG.

In case of damage from perils insured against affecting labels only, loss to be limited to an amount sufficient to pay the cost of reconditioning, cost of new labels and relabeling the goods, provided the damage will have amounted to a claim under the terms of this policy. JAG.

Including (subject to the terms of the Policy) all risks covered by this policy from shippers or manufacturers warehouse until on board the vessel during transshipment if any and from the vessel whilst on quays, wharves or in sheds during the ordinary course of transit until safely deposited in consignees or other warehouse at destination named in policy. JAG.



It is understood and agreed that where this policy attaches on goods on railroads cars, the risks of fire derailment and collision only are covered and that where this policy attaches on goods while on any other land conveyance or while on docks, wharves, or elsewhere on shore, the risks of fire and flood (meaning rising navigable waters) only are covered; but dock risk in no event to exceed ten days. JAG. [8]

Warranted free of capture, seizure and detention and the consequences thereof or any attempt thereat *privity* excepted and also from all consequences or riots and civil commotions, hostilities or warlike operations whether before or after declaration of war. Warranted free of loss or damage caused by strikers locked-out workmen or persons taking part in labor disturbances or riots or civil commotions.

General average payable as per Foreign Custom or per York-Antwerp Rules, if in accordance with the contract of affreightment.

In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

Warranted free from particular average unless the vessel or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance.

Underwriters, notwithstanding this warranty, to pay for any damage caused by fire or by collision with any other ship, or vessel or with ice, or with any substance other than water, and any special charges for warehouse, rent, reshipping or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages, which may be totally lost in transshipment.

Grounding in the Columbia and/or Willamette Rivers or in the Panama Canal, or in the Suez Canal, or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Platte (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River on *on* the Yenikale or Bilbao Bar, shall not be deemed to be a stranding, but Underwriters to pay any damage or loss which may be proved to have directly resulted therefrom.

Warranted free from any claim consequent on loss of time, whether arising from a peril *or* the sea or otherwise.

Including all risk of Craft and Boats to and from the Ship or Vessel.

All clauses annexed hereto or stamped or written hereon, including the clauses printed herein in italics, shall control other printed conditions inconsistent with the same.

(Under Deck) in the Ship or Vessel called the as per contract attached whereof — is at present

Master or whoever shall go for Master in the said Ship or Vessel——. AND the said Company promises and agrees that the Insurance aforesaid shall commence from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel Craft or Boat at as above and continue until the said Goods and Merchandise be discharged and safely landed at as above. AND that it shall be lawful for the said Ship or Vessel in the Voyage so Insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance. AND touching the Adventures and Perils which the said Company is contented to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men of Ware Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Surprisals Taking at sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof. [9] AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labor and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the charge whereof the said Company will bear in proportion

to the sum hereby Insured. AND it is expressly declared and agreed that the acts of the Insurer or Insured in Recovering Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment. AND it is declared and agreed that Corn Fish Salt Saltpetre Fruit Flour Rice Seeds Hides Skins and Molasses shall be and are warranted free from average unless general or the Ship be stranded sunk or burnt or unless caused by collision with another Ship or Vessel and that Sugar Tobacco Hemp and Flax shall be and are warranted free from average under Five Pounds per Centum and that all other Goods and also the Freight shall be and are warranted free from average under Three Pounds per Centum unless general of the Ship be stranded sunk or burnt or unless caused by collision with another Ship or Vessel.

In case of any lawful claim arising on this Policy it is agreed that the same shall be settled at Seattle, Wash. by The Union Marine Ins. Co., Ltd. it being understood that notice of such claim shall be given in writing by the holder of the Policy to the Company or its Agents as soon as practicable and that the adjustment and settlement thereof be made in conformity with the laws and customs of England but in the event of any difference of opinion arising between the said parties the settlement shall be referred to the Company in Liverpool.

It is warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any

loss or damage thereto, and any stipulation or agreement that such carrier or bailee shall have the benefit of this insurance shall avoid this Policy or Contract of Insurance. It is understood and agreed that the assured may accept, without prejudice to this insurance, the ordinary bills of lading issued by carrier, and it is agreed that the assured shall not enter into any special agreement with the carrier releasing them from their common law or statutory liability.

In the event of damage for which the Company may be liable the Company's Agents must be applied to for survey and in cases where the Company has no Agents at port of discharge Lloyd's Agents must be applied to. All claims for average should be accompanied by a Certificate from such Agents.

IN WITNESS WHEREOF, the Company has caused these presents to be signed by its General Agent in the City of San Francisco, State of California, but this policy shall not be valid unless countersigned by the duly authorized Agent of the Company at Seattle, Wash.

Countersigned at Seattle, Washington, this 8th day of June, 1922.

DRAGE-GRAESSNER CO.

By J. A. GRAESSNER,

Agent.

EDWIN C. A. KNOUTH. [10]

## EXHIBIT "B."

Copy.

MARINE DEPARTMENT.

Endorsement.

Vessel "Sound Steamer" as per Contract.

It is warranted by the assured to report every shipment, with all its particulars, on the day of receiving advice thereof, or as soon thereafter as may be practicable, or within fifteen days from date of shipment, and should assured fail to so report any risk covered hereby, or to pay premium or premium notes when due, then the policy and entire insurance contemplated in the contract to which this endorsement is attached, whether reported or not, shall become null and void.

All other terms and conditions remaining unchanged.

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Assured.

This slip is attached to and forms part of Open Policy No. 120 of the Union Marine Ins. Co., Ltd. issued to Olympia Canning Company Seattle, Wash., August 4th, 1922.

J. A. GRAESSNER COMPANY.

J. A. GRAESSNER,

Agents. [11]

EXHIBIT "C."

Copy.

MARINE DEPARTMENT.

Endorsement.

Vessel ———.

It is hereby understood and agreed that shipments per vessels operated by Capt. F. E. Lovejoy between Seattle and Olympia and way ports and *vice versa* are held covered at  $\frac{1}{8}\%$ .

All other terms and conditions remaining unchanged.

This slip is attached to and forms part of Open Policy No. 120 of the Union Marine Ins. Co., Ltd. issued to Olympia Canning Co. Seattle, Wash., June 10, 1922.

DRAGE-GRAESSNER CO.

By J. A. GRAESSNER,

Agents. [12]

EXHIBIT "D."

Copy.

MARINE DEPARTMENT.

Endorsement.

Vessel per Open Policy #120.

It is hereby understood and agreed that the liability of the Union Marine Insurance Co. Ltd., under the Open Policy to which this endorsement is attached, effective on all shipments made on and after November 1st, 1922, is reduced to one-half ( $\frac{1}{2}$ ) in-

terest, but in no event to exceed \$7500.00 part of \$15,000.00 per any one vessel or in any one place at any one time unless otherwise agreed upon at the time of endorsement on policy.

All other terms and conditions remaining unchanged.

This slip is attached to and forms part of Open Policy No. 120 of the Union Marine Insurance Co., Ltd., issued to Olympia Canning Company, Seattle, Washington, October 28th, 1922.

J. A. GRAESSNER CO.  
By J. A. GRAESSNER,  
Agents.

OLYMPIA CANNING CO.

MARK EWALD,  
Vice-Pres.

[Endorsed]: Filed Feb. 1, 1924. [13]

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[Title of Court and Cause.]

#### ORDER OF REMOVAL.

This matter having come on to be heard upon the petition of the defendant above named for an order of the Court removing the above-entitled action from the above-entitled court to the District Court of the United States for the Western District of Washington, Northern Division, and it appearing that said petition is in due form and that with said petition the said petitioner did file a bond for removal, as required by law, and that prior to the filing of said petition and said bond notice of the



filing thereof was given the plaintiff, as provided by law, and the petition having come on to be heard at the time and place stated in said notice, and it appearing to the Court from the facts in said petition set forth and from the files and records in this cause, that said petition should be granted;

NOW, THEREFORE, IT IS HEREBY ORDERED that the above-entitled cause be and the same is hereby removed from the above-entitled court to the District Court of the United States for the Western District of Washington, Northern Division; that the said removal bond filed by petitioner herein be and the same is hereby accepted and approved; that the Clerk of this court is hereby directed to prepare a certified transcript of [14] the record in this action, as provided by law, to be filed in said District Court, and that no further proceedings be taken in this action in this court.

Dated, March 21st, 1924.

MITCHELL GILLIAM,  
Judge.

[Endorsed]: Filed Mar. 21, 1924. [15]

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[Title of Court and Cause.]

ANSWER.

Comes now the defendant above named, The Union Marine Insurance Company, Limited, a corporation, and for answer to plaintiff's complaint admits, denies and alleges as follows:

## I.

Defendant admits the allegations set forth in Paragraph I of said complaint.

## II.

Defendant admits the allegations set forth in Paragraph II of said complaint.

## III.

Defendant admits the allegations set forth in Paragraph III of said complaint.

## IV.

Defendant admits the allegations set forth in Paragraph IV of said complaint.

## V.

Defendant admits the allegations set forth in Paragraph V of said complaint.

## VI.

Defendant admits the allegations set forth in Paragraph VI of said complaint. [16]

## VII.

Answering unto the allegations of Paragraph VII of said complaint, defendant admits that the S. S. "Rubaiyat" was seaworthy when she sailed from the port of Olympia on said voyage bound for Seattle, Washington; defendant further admits that during the course of said voyage said vessel without any fault or neglect on the part of the plaintiff sunk and, together with her cargo, became a total loss; defendant further admits that by reason of the sinking of said vessel the cargo on board her belonging

to plaintiff became a total loss; and defendant denies each and every other allegation in said paragraph set forth, and particularly denies that the cargo on board said vessel became a total loss by reason of any of the perils against which the same was insured, as specified in the contract of insurance between plaintiff and defendant mentioned in said complaint.

### VIII.

Answering unto the allegations of Paragraph VIII of said complaint, defendant admits it has not paid plaintiff one-half of the invoice value of the goods lost, amounting to Forty-two Hundred and Twenty-one Dollars (\$4221.00), or any part thereof; admits plaintiff has made demand for payment of same; and defendant denies each and every other allegation in said paragraph set forth.

FURTHER answering said complaint and as a defense to the allegations thereof defendant alleges:

### I.

That said vessel, the S. S. "Rubaiyat," on September 29, 1923, sailed from the port of Olympia, Washington, bound for Seattle via Tacoma, having on board at the time of sailing from [17] Olympia the cargo mentioned in plaintiff's complaint; that said vessel on said voyage called at the port of Tacoma and there took on board additional cargo, to wit: gypsum in sax, plaster in sax and other cargo; that the cargo taken on board said vessel at Tacoma was so improperly stowed on the vessel as to make her topheavy, unstable, tender and unfitted to

continue the voyage; that a few minutes after leaving the dock at Tacoma bound for Seattle, she capsized and sunk and with her cargo became a total loss; that at the time the sea was calm and the weather fair; that the capsizing and sinking of said vessel and the loss of said cargo was caused solely by her said topheavy, unstable, tender and unfit condition, and was not caused by perils of the seas or any other perils or risks covered by the contract of insurance mentioned in plaintiff's complaint.

WHEREFORE, defendant prays that this action be dismissed and that it do have and recover from plaintiff its costs and disbursements herein and for such other relief as defendant may be entitled to receive.

SHORTS & DENNEY,  
Attorneys for Defendant.

United States of America,  
State of Washington,  
County of King,  
City of Seattle,—ss.

Bruce C. Shorts, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

That he makes this verification for the reason that [18] there is no officer of said defendant present within this judicial district.

BRUCE C. SHORTS.

Subscribed and sworn to before me this 8 day of April, 1924.

R. G. DENNEY,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Copy received. Date Apr. 12, 1924

BOGLE, MERRITT & BOGLE.

By \_\_\_\_\_.

[Endorsed]: Filed Apr. 12, 1924. [19]

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[Title of Court and Cause.]

#### DEMURRER.

Comes now the plaintiff, Olympia Canning Company, a corporation, and demurs to the answer of the defendant herein on the ground that said answer does not set up facts sufficient to constitute a defense to the cause of action set forth in the complaint herein.

BOGLE, BOGLE & HOLMAN,  
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 29, 1925. [20]

---

[Title of Court and Cause.]

#### DECISION.

(On Demurrer to Aff. Defense.)

Filed April 14, 1925.

Plaintiff seeks to recover under contract of marine insurance for goods shipped aboard the S. S.

“Rubaiyat” on the voyage from Olympia to Seattle, the material part providing:

“And touching the dangers and perils which said company is contented to bear and does take upon itself in the voyage so insured as aforesaid, they are of the sea \* \* \* , and all other perils, losses and misfortunes that have or shall come \* \* \* to the \* \* \* damage of the aforesaid subject matter of this insurance or any part thereof.

All losses and customs are to be adjusted in accordance with the laws and customs of England.

The defendant admits the shipping of the cargo in harmony with the provisions of the policy; that the vessel was seaworthy when she sailed from the port of Olympia; that during the course of the voyage, without any fault or neglect on the part of the plaintiff the vessel sank, together with her cargo, and became a total loss; admits demand made for the loss by the plaintiff, refusal to pay, and as an affirmative defense states that the vessel sailed from the port of Olympia bound for Seattle via Tacoma, having on board the cargo set out in the complaint; that at the port of Tacoma additional cargo was taken which was improperly stowed, and the vessel, by reason thereof, became “topheavy, unstable, tender, and unfitted” to continue the voyage; that shortly after leaving the dock at Tacoma she capsized and sank and with her cargo became a total loss; that at the time the sea was calm, the weather fair, and the sinking was caused solely by her said topheavy, unstable, tender and unfit con-

dition, and was not caused by perils of the seas or any other perils or risks covered by the contract of insurance mentioned.

The plaintiff has demurred to the affirmative defense. [21]

Messrs. BOGLE, BOGLE & HOLMAN, of Seattle, Washington, Attorneys for Plaintiff.

Messrs. SHORTS and DENNEY, of Seattle, Washington, Attorneys for Defendant.

JEREMIAH NETERER, District Judge:

In the absence of adverse proof, it is presumed that the ship foundering at sea is because of the "peril of the sea." Rule 7, Sched. 1, Eng. Marine Act, 1906. *Delanty vs. Yang Tsze Ins. Assn.*, 127 Wash. 238. Here the cause is known. The ship was seaworthy at the inception of the voyage. The issue is, was the loss due to a peril of the sea? There is a distinction between "damages arising on the sea" and "perils arising directly from the sea." *Merrill vs. Arey*, 17 Fed. Cas. 83. Judge Ware, in *Merrill, supra*, held that "dangers of the seas" included only those which accrued from the action of the elements and such as are incident to that cause, rather than to those arising on the seas. Circuit Judge Wallace, for the court, in *The Warren Adams*, 74 Fed. 413, said:

"All marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence, upon the fabric of the vessel; casualties which may, and not consequences which must, occur."

Circuit Judge Rogers, for the court, in *The Giulia*, 218 Fed. 744 at 746, said:

“Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence.”

Circuit Judge Hough, for the court, in *The Rosalia*, 264 Fed. 285, at 288, said:

“ \* \* \* something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety.”

Circuit Judge Gilbert, for the court, in *Aetna Ins. Co. et al. vs. Sacramento-Stockton S. S. Co.*, 273 Fed. 55, said at page 61:

“We reach the conclusion that by the English law and practice a peril of the sea need not be extraordinary, in the sense of being catastrophic or necessarily the result of uncommon causes, and that severe storms, rough seas, and even fogs may be comprised in the perils of the seas.”

Circuit Justice Washington, in *U. S. vs. Hall*, 26 Fed. Cas. 84 at 85, speaking of perils of the seas, said:

“ \* \* \* It may safely be laid down that the accident which is attributable to this cause must happen without any fault or negligence of the master, and must occur at sea.” [22]



The King's Bench Division, Feb. 19, 1924, 40 Times Law Reports, page 347, in an action to recover on a policy of insurance on a submarine "covering all and every risk" to the vessel whilst being broken up, during which breaking up, as the result of negligence the vessel sank to the bottom, the Court held:

“ \* \* \* that the unintentional admission of sea water into a ship whereby she was caused to sink was a peril of the sea, and therefore, even if the policy was to be read as an ordinary marine policy, so that the Court must find something in the nature of a marine peril before the underwriters could be held liable, the plaintiffs were entitled to recover.”

All matters in the affirmative defense well pleaded are admitted by the demurrer. Eliminating the conclusions from the issuable fact pleaded, it is admitted that there was nothing in the nature of a marine peril which caused the sinking. *Ionides vs. Universal Marine Assn.*, 9 R. C. 351;—The Law Times Report, Vol. 8, new series 705,—is clearly distinguishable from the issue here, as is also *P. Samuel & Co. vs. Dumas*, 26 Eng. Com. Cases, 239,—93 Law Journal Rep. 415, King's Bench Division 1924, in which the Court held scuttling a ship not a peril of the sea. The Court also said in this case all storms are fortuitous, and "ordinary action of the waves is not." In *Redman vs. Wilson*, 14 M. & W. 476, 153 Eng. Rep. 562, Exchequer Book 9, the vessel was unskillfully loaded and sprung a leak, but before stranding was in a tornado, and the Court

decreed recovery for the loss suffered after the tornado.

A fortuitous event is the happening of that which we cannot resist. *Viterbo vs. Friedlander*, 120 U. S. 707. A happening independently of human will or means of foresight, resulting from unavoidable physical causes, Webster.

If the vessel had sunk at the dock by reason of overloading, or improper loading with "gypsum in sax, plaster in sax and other cargo," it could not be seriously contended that the sinking was because of a peril of the sea. *The G. R. Booth*, 171 U. S. 450. The loading being of such a character that within "a few minutes" after leaving the dock she sunk in a calm sea, the weather being fair, by reason of the tender condition occasioned by the improper loading, the same result follows. The policy in issue is the ordinary marine policy, and "the Court must find something in the nature of a marine peril" before recovery may be had,—40 *Times Law Reports*, *supra*,—and from the admitted facts this cannot be done. The phrase "*all other perils*," etc., in the policy must refer to the "perils of the seas" and be held to have no effect, since there is no doubt as to the "specific causes of loss." *Anthony vs. Aetna Ins. Co.*, 1 Fed. Cases 1086.

Demurrer is overruled.

NETERER,

United States District Judge.

[Endorsed]: Filed Apr. 14, 1925. [23]

[Title of Court and Cause.]

ORDER OVERRULING PLAINTIFF'S DEMURRER TO DEFENDANT'S ANSWER.

This matter having come on to be heard in open court upon plaintiff's demurrer to defendant's answer, plaintiff appearing by Messrs. Bogle, Bogle & Holman, its attorneys, and defendant appearing by Messrs. Shorts & Denney, its attorneys; the Court having heard the arguments of the attorneys for both plaintiff and defendant, and having duly considered the memorandum briefs filed by both parties, and having thereafter on April 14, 1925, filed a memorandum of the Court's decision overruling said demurrer,

NOW, THEREFORE, pursuant to said decision, it is hereby ORDERED, ADJUDGED and DECREED that plaintiff's said demurrer to the affirmative defense as set forth in defendant's answer, be and the same is hereby overruled.

Plaintiff excepts. Exception allowed.

Done in open court this 13 day of July, 1925.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed Jul. 13, 1925. [24]

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff above named and replying to the allegations of the affirmative defense of the defendant above named, admits, denies, and alleges as follows:

I.

Plaintiff admits that the S. S. "Rubaiyat" on September 29, 1923, sailed from the port of Olympia, Washington, bound for Seattle via Tacoma, having on board at the time of sailing from Olympia the cargo mentioned in the plaintiff's complaint herein; admits that said vessel during the course of said voyage called at the intermediate port of Tacoma and there took on board additional cargo, to wit, gypsum in sax, plaster in sax, and other cargo; admits that a short time after leaving the dock at Tacoma, bound for Seattle, said vessel capsized and sunk and together with her cargo became a total loss. Except as herein admitted, the plaintiff denies each and every allegation in said affirmative defense contained.

WHEREFORE, plaintiff, having fully answered the allegations of said affirmative defense, prays that it have judgment herein against the defendant for the amount prayed for in its complaint herein.

BOGLE, BOGLE & HOLMAN,

Attorneys for Plaintiff. [25]

United States of America,  
Western District of Washington,  
Northern Division,—ss.

Lawrence Bogle, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true. That he makes this verification for the reason that there is no officer of said plaintiff present within the Western District of Washington, Northern Division.

LAWRENCE BOGLE.

Subscribed and sworn to before me this 9th day of July, 1925.

[Seal]

D. T. CHILD,

Notary Public in and for the State of Washington,  
Residing at Seattle.

[Endorsed]: Filed Jul. 14, 1925.

Copy of attached reply received and due service thereof admitted upon July 9, 1925.

SHORTS and DENNEY,  
Attorney for Defendant. [26]

[Title of Court and Cause.]

### STIPULATION WAIVING JURY.

The undersigned attorneys of record for plaintiff and defendant above named hereby stipulate and agree that the issues of fact in the above-entitled cause may be tried and determined by the Court without the intervention of a jury.

Dated, Seattle, Washington, July 13, 1925.

BOGLE, BOGLE & HOLMAN,

Attorneys for Plaintiff.

SHORTS and DENNEY,

Attorneys for Defendant.

[Endorsed]: Filed Jul. 22, 1925. [27]

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[Title of Court and Cause.]

### DECISION.

Filed July 15, 1925.

Messrs. BOGLE, BOGLE & HOLMAN, of Seattle, Wash., Attorneys for Plaintiff.

Messrs. SHORTS and DENNEY, of Seattle, Wash., Attorneys for Defendant.

JEREMIAH NETERER, District Judge.

From a consideration of all of the evidence in this case and the law applicable thereto, the conclusion to my mind is inevitable that a decree must be entered for the respondent, and formal order may be presented for signature.

NETERER,

United States District Judge.

[Endorsed]: Filed Jul. 15, 1925. [28]

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[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW.

This cause having come on to be tried and determined upon the merits on July 13, 1925, before the Hon. Jeremiah Neterer, Judge of the above-entitled court, without the intervention of a jury (a jury having been expressly waived by stipulation of the parties), upon the issues framed by plaintiff's complaint, defendant's answer and plaintiff's reply, plaintiff appearing by its attorneys of record, Messrs. Bogle, Bogle & Holman, the defendant appearing by its attorneys of record, Messrs. Shorts & Denney, witnesses having been duly sworn and examined and other evidence introduced on behalf of both parties, the Court, having heard and considered the same and the arguments of counsel, and being fully advised in the premises, does hereby make the following

FINDINGS OF FACT.

I.

That Olympia Canning Company, plaintiff herein, is and at all times hereinafter mentioned has been, a corporation, organized and existing under the laws of the State of Washington, with its principal place of business in the city of Olym-

pia, Washington; that it has paid all fees due the State of [29] Washington, including its last annual license fee.

## II.

That defendant, The Union Marine Insurance Company, Limited, is and at all times hereinafter mentioned has been, a corporation, created and existing under the laws of the United Kingdom of Great Britain, with its principal office in the city of Liverpool; that it has complied with all the requirements of the insurance code of the State of Washington, and is privileged to sue, and subject to be sued, in the State of Washington under and by virtue of the provisions of said State Insurance Code.

## III.

That on the 8th day of June, 1922, the defendant entered into a contract of insurance with the plaintiff, being Open Policy No. 120 of said defendant Company, a copy of which is attached to plaintiff's complaint as Exhibit "A"; that the contract was subsequently modified by endorsements attached to plaintiff's complaint as Exhibits "B," "C" and "D"; that by virtue of said contract of insurance, defendant insured plaintiff against loss caused by certain hazards or perils in said policy specified on canned goods shipped by plaintiff from Olympia to Seattle, Washington, on certain vessels, including the M. S. "Rubaiyat," liability for loss on account of any shipment on any one vessel to be limited to one-half of plain-



tiff's interest in such goods and not to exceed \$7,500.00.

## IV.

That among other provisions in the policy it was provided:

“AND touching the Adventures and Perils which the said Company is contented to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men of War Fire Enemies Pirates Rovers Thieves [30] Jettisons Letters of Mart and Counter Mart Surprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof.”

## V.

That on or about the 29th day of September, 1923, and while said contract of insurance was in full force and effect, the plaintiff, at Olympia, Washington, shipped on board said M. S. “Rubaiyat” for transportation and carriage from Olympia to Seattle (via Tacoma) 1953 cases of canned goods of the invoice value of \$8,443.00, and plaintiff promptly declared one-half of the value of said shipment, to wit: the sum of \$4,221.00, to defendant, said sum being the amount at risk under said contract of insurance.

## VI.

That at the time said vessel sailed from Olympia with said cargo on board she was in every respect seaworthy for a voyage from Olympia to Seattle.

## VII.

That said vessel was of the registered length of 59.6 ft., breadth, 22.4 ft. and depth, 8.5 ft., and her registered net tonnage was seventy-four tons, dead weight about 130 tons and she had a sharp head and a transom stern. That in said vessel was an elevator, located slightly forward of amidships, said elevator consisting of a platform about 8 ft. wide by 16 ft. long, which elevator operated between four upright posts, one at each corner, extending from the floor of the vessel upward a considerable distance above the upper deck, said platform being raised and lowered by means of cables operated through pulleys located on [31] the superstructure resting upon the upper ends of said posts; that said vessel had a main deck and an upper deck, in both of which were openings the size of said elevator platform; that said elevator was used for handling cargo to the lower hold and to both decks; that the captain's room, the pilot-house and the life-boats were all located on the upper deck aft of the elevator.

## VIII.

That when said vessel left Olympia she had on board about sixty tons, dead weight, of canned goods and some other cargo of household goods,

a portion of which was located on the upper deck forward of the elevator. That after sailing from Olympia said vessel called at the port of Tacoma and there took on board sixty-two additional tons of cargo, consisting of gypsum in sax and plaster in sax. That on sailing from Tacoma she had on board one hundred twenty-two tons of cargo, of which ten and one-half tons were on the upper deck forward of the elevator, twenty-one tons were in the lower hold, and ninety and one-half tons were on the main deck. That the elevator platform was flush with the floor of the upper deck and constituted a part of such floor and no cargo was stowed beneath such platform. That she had 15 tons of rock ballast alongside her keel, and 500 gallons of fuel oil and 140 gallons of water in steel tanks below the main deck.

#### IX.

That when said vessel left Tacoma she was so heavily loaded that at her ports she had only about six inches freeboard which was the maximum she could be put down with safety, and she was deeper down on this voyage than on any previous voyage; that there was ample room below to have put all the cargo that was stowed on the upper deck. [32]

#### X.

That as said vessel backed out of her dock in the Waterway at Tacoma, she encountered the wash or displacement waves of the steamer "Indianapolis," which last-named vessel had previ-

ously entered the waterway and was then coming to her mooring at the municipal dock on the opposite side of the waterway; that such wash or displacement waves did not cause any undue rolling or indicate crankiness or tenderness of the vessel; that said vessel then proceeded for about fourteen minutes and for a distance of about two and one-half miles, and without meeting any other vessel, to a point in Commencement Bay, where certain well-known tidal currents exist and a current caused by the waters of the Puyallup River emptying into said Bay. Upon reaching this point her master brought her wheel over one-half a point to change her course, whereupon the vessel suddenly took a list to port, then gradually went over to starboard, filled up with water, capsized and sunk, both vessel and cargo becoming a total loss.

### XI.

That at the time the surface of the water was calm and the weather was fair and clear. That the listing, capsizing and sinking of the vessel was caused by her being in so topheavy, unstable, tender and unfit condition, due to the improper manner in which the cargo taken on at Tacoma was stowed aboard her as to be unable to withstand the effect of said tidal or cross-currents and was not caused by perils of the seas, or any other perils or risks covered by the contract of insurance hereinbefore mentioned.

Done in open court this 24 day of July, 1925.

JEREMIAH NETERER,

Judge.

The Court, having made and entered the foregoing findings of fact, now makes the following  
[33]

## CONCLUSIONS OF LAW.

### I.

That defendant is not liable to plaintiff under said contract of insurance for the loss of plaintiff's said goods.

### II.

That a decree should be entered herein dismissing this action with prejudice and awarding to defendant its costs and disbursements herein.

Done in open court this 24th day of July, 1925.

JEREMIAH NETERER,  
Judge.

Plaintiff excepts to findings of fact No. IX and XI upon the ground that the same are not supported by the evidence herein and that the evidence is contrary thereto, which exceptions are hereby allowed.

JEREMIAH NETERER,  
Judge.

Plaintiff excepts to Conclusions of Law No. I upon the ground that the same is not sustained by the evidence but is contrary thereto.

Plaintiff excepts to Conclusion of Law No 2 upon the ground that the same is not sustained by the evidence, or findings herein and is contrary thereto and erroneous.

Foregoing exceptions allowed this 24th of July, 1925.

JEREMIAH NETERER,  
Judge.

[Endorsed]: Filed Jul. 24, 1925. [34]

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

No. 8,439.

OLYMPIA CANNING COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

THE UNION MARINE INSURANCE COM-  
PANY, LIMITED, a Corporation,  
Defendant.

### DECREE.

This cause having come on to be tried and determined upon the merits on July 13, 1925, before the Hon. Jeremiah Neterer, Judge of the above-entitled court, without the intervention of a jury (a jury having been expressly waived by stipulation of the parties), upon the issues framed by plaintiff's complaint, defendant's answer and plaintiff's reply, plaintiff appearing by its attorneys of record, Messrs. Bogle, Bogle & Holman, the defendant appearing by its attorneys of record, Messrs. Shorts & Denney, witnesses having been

duly sworn and examined and other evidence introduced on behalf of both parties, the Court, having heard and considered the same and the arguments of counsel, and having made and entered its findings of fact and conclusions of law herein, and being now fully advised in the premises:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, in conformity with said findings of fact and conclusions of law, that the above-entitled action be and the same is hereby dismissed with prejudice, and that defendant do have and recover from plaintiff its costs and disbursements to be taxed herein.

Done in open court this 24th day of July, 1925.

JEREMIAH NETERER,

Judge. [35]

Plaintiff excepts to the foregoing decree and its exception is allowed this 24th day of July, 1925.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed Jul. 24, 1925. [36]

[Title of Court and Cause.]

### PETITION FOR WRIT OF ERROR.

Olympia Canning Company, a corporation, the plaintiff in the above-entitled action, conceiving itself aggrieved by the decision and judgment of this Court made and entered against it and in favor of the defendant, The Union Marine Insurance Company, Ltd., a corporation, on July 24, 1925, and the findings of fact and conclusions of law made and entered by said Court on the same day, and having severally taken objections and exceptions to said judgment, findings of fact and conclusions of law, and having duly noted and set forth the said objections in its assignments of error filed herewith, respectfully petitions the above-entitled court for an order allowing the said plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, and further respectfully petitions said Court for an order fixing the amount of security which said plaintiff shall give and furnish in said writ of error, and that upon giving such security, all further proceedings in the above-entitled cause be stayed until the dismissal of the said writ of error by the said United States Circuit Court of Appeals.

Relative to this petition, said Olympia Canning Company, a corporation, respectfully shows that by reason of the premises [37] manifest error has happened to the great damage of the plaintiff herein,



and that plaintiff has filed herewith its assignments of error upon which it relies and will urge in said United States Circuit Court of Appeals.

WHEREFORE, Said plaintiff, Olympia Canning Company, a corporation, prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to the above-entitled court for the correction of the error so complained of and that a transcript of the record of proceedings, papers, and all things concerning same, upon which such judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that said plaintiff recover judgment as demanded in its complaint.

BOGLE, BOGLE & HOLMAN,  
Attorneys for Plaintiff.

Due service of the within petition for writ of error is admitted this 30th day of July, 1925.

SHORTS and DENNEY,  
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [38]

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[Title of Court and Cause.]

#### ASSIGNMENTS OF ERROR.

Comes now the above-named plaintiff, Olympia Canning Company, a corporation, appearing by Bogle, Bogle & Holman, its attorneys of record, and says that the judgment made and entered in the above-entitled cause on July 24, 1925, in favor of the defendant and against the plaintiff is er-

roneous, and against the just rights of said plaintiff, and files herein, together with its petition for a writ of error from said judgment the following assignments of error which said plaintiff avers occurred upon the trial of said cause:

I.

The Court erred in entering judgment in favor of the defendant herein and against the plaintiff herein.

II.

The Court erred in making Finding of Fact No. IX on the ground that no competent evidence was offered or received at the trial tending to prove the allegations of said finding of fact No. IX, and that said allegations of said findings of fact were and are against the preponderance of the evidence.

III.

The Court erred in making Finding of Fact No. XI on the [39] ground that no competent evidence was offered or received at the trial tending to prove the allegations of said findings of fact No. XI and that said allegations of said findings of fact were and are against a preponderance of the evidence.

IV.

The Court erred in making and entering the first conclusion of law herein and the whole thereof for the reason that said conclusion is not supported by the findings of fact or the evidence herein.

V.

The Court erred in making and entering the second conclusion of law and the whole thereof for the reason that said conclusion is not supported by the findings of fact or the evidence herein.

VI.

The Court erred in making and entering an order herein overruling the plaintiff's demurrer to the defendant's affirmative answer herein.

VII.

The Court erred in holding that the loss of the plaintiff's goods was not caused by a peril of the sea within the terms of the policy issued by the defendant.

VIII.

The Court erred in refusing to enter judgment herein in favor of the plaintiff and against the defendant herein.

BOGLE, BOGLE & HOLMAN,  
Attorneys for Plaintiff.

Due service of the within assignments of error is admitted this 30th day of July, 1925.

SHORTS and DENNEY,  
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [40]

[Title of Court and Cause.]

### ORDER ALLOWING WRIT OF ERROR.

On this 30th day of July, 1925, came the plaintiff, Olympia Canning Company, appearing by its attorneys, Bogle, Bogle & Holman, and filed herein and presented to the court its petition praying for the allowance of a writ of error from the decision and judgment of this court made and entered in this cause July 24, 1925, in favor of the defendant and against the plaintiff, together with its assignments of error intended to be urged by the plaintiff within due time and also praying that a transcript of the record of proceedings and papers upon which the said judgment herein was entered, duly authenticated, may be sent to said Circuit Court of Appeals for the Ninth Circuit; and also praying that an order be made fixing the amount of the security which the said plaintiff shall give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings in this court be suspended and stayed until a determination of the said writ of error by the said Circuit Court of Appeals, and that such other and further proceedings may be had as may be proper in the premises;

Now, therefore, in consideration thereof, this Court does allow said writ of error upon the said plaintiff filing with the Clerk of this court a good and sufficient bond in the sum of [41] \$250.00, to the effect that if the said plaintiff shall prosecute the said writ of error to effect and answer all dam-

ages and costs, if plaintiff fails to make good its plea, then said bond to be void; otherwise to remain in full force and virtue. Said bond is to be approved by this court; and

IT IS NOW ORDERED, That all proceedings in this court and cause are hereby suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit, and the said bond shall operate as a super-seedeas bond.

Dated this 30th day of July, 1925.

JEREMIAH NETERER,  
Judge.

Approved as to form.

SHORTS and DENNEY,  
Attorneys for Defendant.

Due and sufficient service by copy of the foregoing order allowing writ of error is acknowledged this 30th day of July, 1925.

SHORTS and DENNEY,  
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [42]

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[Title of Court and Cause.]

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That Olympia Canning Company, a corporation, principal, and American Surety Company of New York, a corporation organized under the laws of the State of New York and authorized to transact

business in the State of Washington, surety, are held and firmly bound unto The Union Marine Insurance Company, Ltd., a corporation, the defendant above named, in the sum of (\$250.00) Two Hundred Fifty Dollars, to be paid unto the said The Union Marine Insurance Company, Ltd., for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 30th day of July, 1925.

WHEREAS, the above-named principal is prosecuting a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause entered by the District Court of the United States for the Western District of Washington, Northern Division on July 24, 1925.

NOW, THEREFORE, the condition of this obligation is such that if the above-bounden principal shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise [43] to be and remain in full force and effect.

OLYMPIA CANNING COMPANY.

By BOGLE, BOGLE & HOLMAN,

Its Attorneys.

Principal

AMERICAN SURETY COMPANY OF  
NEW YORK.

By A. E. KRULL,  
A. E. KRULL,  
Resident Vice-President.

[Seal] Attest: E. F. KIDD,  
E. F. Kidd—Resident Assistant Secretary,  
Surety.

Approved as to form and amount this 30 day of  
July, 1925.

SHORTS and DENNEY,  
Attorneys for Defendant.

Approved as to form and amount this 30th day  
of July, 1925.

JEREMIAH NETERER,  
Judge.

[Endorsed]: Filed Jul. 30, 1925. [44]

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[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on the 13th day of July, 1925, at Seattle, Washington, the above-entitled action came on for trial before the Honorable Jeremiah Neterer, District Judge,—the plaintiff appearing by Messrs. Bogle, Bogle & Holman, its attorneys, and defendant appearing by Messrs. Shorts & Denney, its attorneys, and by written stipulation filed in the above-entitled court, a jury having been waived, said cause was tried to the court.

(Testimony of George J. Ryan.)

Whereupon, the following proceedings were had:

The policy of insurance issued by the defendant to the plaintiff, upon which the said suit was based, was received in evidence as Plaintiff's Exhibit No. 1.

Whereupon the following testimony was offered:

TESTIMONY OF GEORGE J. RYAN, FOR  
PLAINTIFF.

GEORGE J. RYAN, having been called by plaintiff as a witness, being first duly sworn, stated:

That he was a master mariner and had been master of the steamer "Rubiayat" for a period of five and one-half months and was master at the time she sank in Tacoma Harbor. That he was familiar with the manner in which she was loaded on this particular voyage, and that she had been loaded with as much cargo on [45] the upper deck on previous voyages.

(Plaintiff's Exhibit 2, being the chart of Commencement Bay, was offered in evidence without objection.)

The witness drew with a blue pencil on said chart the course of the "Rubiayat" from the time she left the dock at Tacoma Harbor until she foundered. Point "A" being the dock from which she departed, point "C" where she changed her course in backing out of the waterway, and point "B" where she foundered. The witness testified that in backing out of the waterway and turning around, the steamer "Indianapolis" passed about fifty feet off. That said steamer "Indianapolis" threw up



(Testimony of George J. Ryan.)

a displacement wave of about a six foot swell which struck the "Rubiayat" broadside; that said displacement wave did not affect the "Rubiayat"; that said vessel did not indicate any crankiness or tenderness at the time of passing the "Indianapolis" or at any time until immediately prior to her foundering. The first indication of danger was when the vessel took a list to port, and the witness, who was at the wheel, gave her a starboard helm to meet the list to port. The vessel thereupon took a list to starboard and foundered. That after backing out from the dock, the vessel had proceeded about two and one-half miles up to the time she foundered, and that there were no heavy seas at said time.

#### Cross-examination.

On cross-examination, the witness testified: That the waterway in Tacoma from which they departed was about one hundred feet wide; at the time the "Indianapolis" passed the "Rubiayat," she was slowed down to make a landing at the municipal dock directly opposite; that said vessel throws from a four to a six-foot wave when going full speed, which would follow her into the waterway. That at the entrance to the waterway is about half a mile from the point [46] where the "Indianapolis" passed the "Rubiayat"; she had slowed down.

The witness further testified that the "Rubiayat" was 65 feet in length over all, 59'6" between perpendiculars; 22'4" in width and 8'4" in depth, with a net tonnage of 74 tons.

TESTIMONY OF FRANK C. LOVEJOY, FOR  
PLAINTIFF.

FRANK C. LOVEJOY, being sworn as a witness for the plaintiff, testified:

That he was the owner of the "Rubiayat," had built said vessel and to a great extent had designed her. That he has held a master's license for fifteen years, operated extensively in Puget Sound waters for about eleven years as master and had operated the steamer "Rubiayat." That he was familiar with the manner in which she was loaded at the time she left Tacoma prior to her foundering; that on previous trips when he was operating the "Rubiayat," he had had more cargo on her upper decks than she had at the time she foundered, and that she had indicated no particular tenderness under such circumstances.

"Q. Captain, are you familiar with the tides and currents in Commencement Bay?

A. Yes, sir.

Q. Just state to the Court what the currents there are, the action of the tide in Commencement Bay, referring to this Plaintiff's Exhibit 2.

A. The currents as a whole are circular in motion in Commencement Bay, due to the tide ebbing down through by Point Defiance, and down through the West Pass, and the flood coming through the East Pass, or Vashon Island, so that at every flood there is a clockwise motion of the tides in the bay there at Tacoma, probably eighty per cent of the time, except near slack water, that is, both slack high

(Testimony of Frank C. Lovejoy.)

and low, the tides are flowing in one direction from about Sperry's Mill, or the Terminal Docks, out towards Point Defiance, Old Town, out that way. The tide is a good eighty per cent of the time in the one direction, north. There is a break at the edge of this circle, which is about off the Terminal Docks, or near where the "Rubiayat" was sunk, where there is three separate currents entering into it. One is this circular current, the other is the water from the water at Tacoma, where the regular [47] boats land, and the other is a current from the river. It is uncertain as to just where that is. It will vary back and forth over an area of a mile or so, but those familiar with towing logs in there watch the boats come in. It is very conspicuous, this large circle in the bay, and a boat will get at least three or four miles out of the shortest route between Point Defiance and the mills in making the mills, due to this tide, and will do it even though to all appearances there should be a fair tide.

Q. What effect does the current coming out of the waterway, and this river—is that what you have just described?

A. Yes, sir. It would be uncertain as to just what it would be. There would be cross currents, and a tendency to whirlpool. While they are not very strong they are noticeable to anyone steering a boat through them.

The COURT.—What effect does it have on the boat?

(Testimony of Frank C. Lovejoy.)

A. To make her loose or steer crooked.

The COURT.—How is that?

A. To make her either loose or steer crooked; that is, she would tend to deviate from her course when meeting this, or else list over a little.

Q. Of course you are familiar with the construction of the "Rubiayat," her design, etc.?

A. Yes, sir.

Q. And you are familiar with the manner in which she was loaded on the day she foundered?

A. Yes, sir; I think I am.

Q. Considering the fact that she made her turn in the waterway, and encountered the displacement waves from the "Indianapolis" without any serious effect on her, and that she proceeded approximately two miles thereafter under full speed without indicating any crankiness, what would you say would be at least one of the contributing factors to the sudden list and foundering of this vessel?

Mr. SHORTS.—I object to that upon the ground that it calls for the conclusion of the witness. The witness was not present aboard the vessel at the time, and any information he can have is purely hearsay.

Mr. BOGLE.—I am not asking him for the fact; I am asking him as an expert, from his knowledge of the tidal conditions in that harbor, and the admitted facts with reference to this vessel.

The COURT.—Let it go in the record. You may answer.

A. She undoubtedly, or in my mind met with

(Testimony of Frank C. Lovejoy.)

factors other than wholly the loading of the vessel. That is, she met currents which caused her to take a list there, which was the real start of her capsizing.”

#### Cross-examination.

On cross-examination, the witness testified: That he was not present in Tacoma when the vessel was loaded and only knows as to the manner of loading from what others have told him. That his knowledge of tidal conditions in Tacoma [48] Harbor is based upon his personal observations; that fast boats have no occasion to observe these tides and currents but that it is fair to assume that those in charge of the “Rubiayat” and boats her size would have knowledge of the condition of the tides and currents in said harbor. That the “Rubiayat” has an elevator 16’3” by 7’6” which is raised up and down in loading cargo; that there is a steel stanchion at each corner of the elevator weighing approximately 470 pounds each. That the elevator is raised by compressed air from the main engine which is located in the lower hold; that the platform is elevated by cables from the top. That the hoisting apparatus was in the lower hold with wires leading from the drum over the top of the stanchions and down over the four corners; that there were wheels and pulleys at the top of the stanchions, which the wires would run over in order to raise the elevator up and down.

“Q. What houses, if any, were there upon the upper deck?”

(Testimony of Frank C. Lovejoy.)

Mr. BOGLE.—In order to preserve the record I think I shall object to that as incompetent and immaterial, in view of the admission as to seaworthiness. She was seaworthy at the time she left on the voyage.

The COURT.—I think the objection is good, but I will let it go in the record. The Court of Appeals may not feel that way.

A. A house aft of the elevator with a clearance of six feet two, single seal, about 7/8, and the wall is—I think the Texas, which is included within the wheelhouse was on her.

Q. Then the vessel had a main deck?

A. Yes, sir; and a house over the entire main deck.

Q. And below the main deck was the lower hold?

A. The lower hold, yes, sir, for freight and machinery.”

Thereupon, the defendant offered in evidence certified copy of the vessel's documents for the sole purpose of showing her length and other dimensions, which document was received as Defendant's Exhibit "A-1."

The plaintiff having rested, the following proceedings were had:

“The COURT.—Any further testimony?

Mr. BOGLE.—That is all, if your Honor please.

\* \* \* \* \*

Mr. SHORTS.—Will you pardon me; the Court asked if there was any other evidence, and I might state this, that [49] we have entered into a stipu-

lation, as Mr. Bogle has stated, to the effect that the testimony of the witnesses who were examined before the inspectors may be introduced in evidence in this case with the same force and effect as though the witnesses were here and testifying.

Mr. BOGGLE.—Yes.

Mr. SHORTS.—I do not know whether it is necessary to enter into the stipulation and then make it evidence or not, but perhaps I had better do it.

The COURT.—You might introduce it.

Mr. BOGGLE.—We both offer it as evidence in this case.

Mr. SHORTS.—Yes; we are offering this as evidence.

The COURT.—Very well.

\* \* \* \* \*

The COURT.—I think the thing that will determine the case will be this, in my judgment, in my recollection of the case as heretofore submitted; did the currents that were created, as testified to by the last witness on the stand, did they create such a condition as to be a peril within the provisions of the policy. This boat having left the wharf and ran about two miles and a half into the place where this witness says these currents were, would the condition of those currents, the operation of them upon the vessel, create a peril within the policy. That is about the only thing in this case, in my judgment.

(Argument of counsel.)

(Testimony of George J. Ryan.)

The COURT.—I would like to ask the Captain one more question, if there is no objection.

Mr. BOGLE.—None at all.

Mr. SHORTS.—No objection, of course.

TESTIMONY OF GEORGE J. RYAN, FOR  
PLAINTIFF (RECALLED).

GEORGE J. RYAN, recalled as a witness on behalf of plaintiff, testified as follows:

“Q. (By the COURT.) What was the condition of the water just before the vessel listed?

A. It was perfectly calm.

Q. It was perfectly calm? A. Yes, sir.

Q. No current or waves of any sort?

A. There is always that current there.

Q. What current?

A. The cross-current from the river coming in at that point.

Q. What was the condition of that cross-current there?

A. Well, it is really hard to see the condition of the current.

Q. How is that?

A. It is really hard to see just how the tide comes, from up in a pilot-house on a boat. Sometimes you can see it boiling.

Q. Did you run into that before it listed?

A. Yes, sir.

Q. Just how did you operate then?

A. Well, you always turn your boat to meet the



(Testimony of George J. Ryan.)

current, to head into it, just like you would head into a violent storm.

Q. When you ran into that current you listed?

A. Yes, sir. [50]

Q. Listed one way, and then the other way?

A. Yes.

Q. And then sunk?

A. And then went over on her second list.

Q. How big was this current, how did it operate upon the surface of the water?

A. On the surface of the water it looks like a small whirlpool.

The COURT.—All right.

Mr. BOGLE.—May I ask the Captain a question?

The COURT.—Yes.

Q. (By Mr. BOGLE.) Do these currents always operate on the surface or are any of them down below the surface?

A. Well, they operate down below also, but we do not know how deep.

Q. You were drawing how much water?

A. About eight feet; about eight feet, six inches.

Mr. BOGLE.—That is all.

(Witness excused.)

The COURT.—As I view it, that is the determining matter in this case, this cross-current, so far as my mind is concerned.

(Argument of counsel.)

The COURT.—I will frankly say to you gentlemen now, that I believe the cross-currents had

(Testimony of Richard L. Sumner.)

something to do with this boat sinking. I will take the matter under advisement.”

The testimony taken before the United States Local Inspectors of Hulls and Boilers at Seattle and offered on behalf of both parties as evidence in this case follows:

#### TESTIMONY OF RICHARD L. SUMNER.

RICHARD L. SUMNER, being first duly sworn, testified before the United States Local Inspectors of Hulls and Boilers:

That he was in charge of the navigation of the steamer “Fulton” bound from Seattle to Tacoma; that he had just come up from dinner and the second mate was in charge and that he walked into the pilot-house to steady the “Fulton” on her course, at six P. M. It was quite dark, the weather clear. He saw a dim green light on the starboard bow; he gave two short blasts which were answered; that he was standing looking over the quartermaster’s shoulder at the compass in the pilot-house; that the second mate entered the pilot-house and started to enter the course in the log [51] book. He looked through the pilot-house starboard door, the “Rubiayat” being just abeam, and sang out, “Look at her ‘turn turtle.’” Immediately the “Fulton” was stopped, backed, and all hands called on the boat deck for the purpose of manning the life-boats which were dropped in the water and proceeded to the wreckage of the “Rubiayat,” rescuing nine members of her crew. That at the time the second

(Testimony of Richard L. Sumner.)

mate called his attention to the "Rubiayat," she was about one-eighth of a mile off, in the vicinity of the Baker dock. That he saw the "Rubiayat" listing and "turning turtle." That she was listing to starboard; that from the course the "Rubiayat" was making, he judged she was going to Olympia. That the hull of the "Rubiayat" disappeared completely within five minutes from the time she foundered. That at the time of the foundering of the "Rubiayat," there was a very light westerly wind and clear weather. That he had never seen the "Rubiayat" before and had no explanation to offer as to the cause of her foundering.

#### TESTIMONY OF HENRY J. KOLSTER.

HENRY J. KOLSTER, being first duly sworn, testified before the United States Local Inspectors of Hulls and Boilers:

That he was second mate of the "Fulton." That the "Fulton's" life boats were lowered speedily at the time of this accident and reached the wreckage about ten minutes after the "Rubiayat" had foundered; the night was dark and the tide, ebb. That the wreckage was about half a mile off the docks. He further testified that he was watching the "Rubiayat" and when she was about four points off the "Fulton's" starboard bow, she listed to port, came back to starboard, and foundered. That at the time she foundered, she was right abeam the "Fulton." That when he saw the vessel [52] foundering, he sang out to the chief mate that she

(Testimony of Henry J. Kolster.)

was "turning turtle." That the "Rubiayat" did not blow any distress signals; that the listing and foundering happened so quickly that they did not have time to do anything. That at the time he first noticed she was in distress until she had turned over was about thirty seconds. That as soon as the "Rubiayat" had foundered, the "Fulton" reversed and got her life-boats out.

#### TESTIMONY OF HENRY MEHNS.

HENRY MEHNS, being first duly sworn, testified before the United States Local Inspectors of Hulls and Boilers:

That he was chief engineer of the "Rubiayat"; that her engines were in good condition at the time of the accident; that he was in the galley at the time the vessel foundered; that the "Rubiayat" had five hundred gallons of fuel oil in the tank below the main deck; that the engines were located about amidships; that she had a water-tank aft which had a capacity of 280 gallons but which at the time of the accident were only half full; that there was quite a bit of rock and gravel as ballast in her bottom; that her water-tank is 29 inches by 7 feet, set on blocks against the stern end of the boat athwart ships; that the vessel was loaded with freight in the lower hold composed of canned fruit; that he did not know the number of cases. That she also had freight on the main deck, consisting of canned fruit and gypsum in hundred pound sacks; this was stowed forward of the elevator and also aft of the

(Testimony of Henry Mehns.)

elevator; that the "Rubiayat" has a small house coming from the main deck to the upper deck; that the freight on the main deck was pretty well distributed around but he did not know the quantity of same; that there was also a little freight on the upper deck near the bow, but the quantity of same he did not know; that the [53] freight elevator was up, level with the upper deck; that he did not know of anything wrong with the "Rubiayat" until she tipped over; that there was no warning or rolling of the vessel; that she took a small port list and then came back to starboard and never came up; that it all happened in about half a minute; that there was no water in the vessel's bilges at the time she foundered. That as she was loaded upon leaving Tacoma, she had about one and one-half feet free board. He did not think there was anything unusual in the amount of freight she had on board that trip and that she had had as much on previous trips; that he did not notice anything unusual in the way the freight was stowed; before the vessel started to list, he was not alarmed in any way and cannot account for her foundering. That when loaded, the "Rubiayat" has a speed of eight miles per hour and had been making that speed for about fifteen minutes from the time she left the gypsum dock until she foundered, and that she kept perfectly upright until just before she foundered. That George Ryan, master of the vessel was in charge of the navigation and was at the wheel at the time she foundered.

(Testimony of Henry Mehns.)

He further testified that the freight on the upper deck was composed of sacks, canned fruit and furniture; that there was no freight aft on this deck nor was there any freight on the hurricane deck. When the vessel is under way, the elevator is always up and forms a part of the upper deck.

Q. Do you think it was strange that she should list to port before she listed to starboard?

A. No.

Q. What do you suppose made her list both ways in such a short time

A. The only thing I can see is the tide rip.

That in addition to the oil tanks and water-tank, the vessel had one tank of cylinder oil and one tank of kerosene, on the starboard [54] side, containing five gallons and forty gallons respectively.

#### TESTIMONY OF CHARLES SCHROEDER.

CHARLES SCHROEDER, being first duly sworn, testified before the United States Inspectors of Hulls and Boilers:

That he held the position on the "Rubiayat" of dock stevedore, it being his duty to load the trucks as they went aboard the vessel; that upon leaving Olympia, they had on board cases of canned goods, cases of eggs, and household furniture. That after leaving Olympia, their next stop was at Tacoma where they took on board gypsum in hundred pound sacks. That this was loaded on the main deck, about half forward and half aft; that in addition to the gypsum, they took on board about two hun-

(Testimony of Charles Schroeder.)

dred sacks of plaster weighing approximately one hundred pounds to the sack; this was also loaded on the main deck, after half forward and half aft.

That he had been on the "Rubiayat" about three and one-half months and considered her a vessel of good stability and that they had had just about as much cargo on her on previous trips.

"Q. Do you consider that she was overloaded?

A. I could not tell you that. I guess she was all right on that top deck there.

Q. Do you think there was more on the top deck than usual?

A. No, she had just as much there before.

Q. Did she ever at any time while you were on her show any tenderness? A. She rolled quite a bit.

Q. But she always came back? A. Yes."

The accident happened about 6:30. Previous thereto, he had not felt any alarm as to the condition of the "Rubiayat." That he had previously noticed the "Rubiayat" make a list on entering a tide rip and when passing other boats but not as bad as she took this time. That he had no idea what caused her to list. "Can't figure it out?" That the water was level. "There were no passing boats or nothing else" to cause her to list. "Think something must have happened below"; that the boat was loaded down by the head when she left the dock. The weather was clear, and they did not pass any other vessel.

That he had no knowledge as to the manner in which the freight was [55] stowed as that would

(Testimony of Charles Schroeder.)

be done by the stevedore on board the "Rubiayat." He was an experienced stevedore and had always been careful in stowing cargo. That at the time of the accident, there was no shock or jar of any kind. That upon leaving the dock, the vessel was on an even keel and her ports were all closed; that with the vessel going at her regular speed, putting her wheel hard over might affect her stability. The witness was not sure on this point.

#### TESTIMONY OF THOMAS NELSON.

THOMAS NELSON, being first duly sworn, testified before the United States Inspectors of Hulls and Boilers:

That he was a stevedore and assisted in loading the "Rubiayat" at Tacoma. That he had been on the boat about six months and when the boat left Tacoma he had no fear that she was overloaded; that he had seen her loaded just as heavy on previous occasions; that he had seen just as much freight on her upper decks; that in loading this vessel, the freight was trucked from the dock to the elevator and then the elevator lowered to the deck where the freight was to be discharged. That she was stowed from wing to wing, with no chance of her cargo shifting and that the cargo could not have been better stowed. That the stevedore in charge of the loading was an experienced and capable man and that the stowing was done under his and the captain's direction. That the vessel was loaded down pretty heavy but he had seen her loaded just as



(Testimony of Thomas Nelson.)

heavy before and had no opinion as to why she turned over. The only reason he could assign for the accident was that she might have sprung a leak. He had had about twenty-five years' experience on small vessels; that upon leaving Tacoma the vessel had between seven and eight inches of free-board and was down by the head. That he had [56] seen her loaded as deep before. The first indication he had of any danger was when she started to list to starboard; everybody ran to the port side; then she came back and straightened up a little and all of a sudden went back to starboard and kept on going.

#### TESTIMONY OF ALBERT CONKLIN.

ALBERT CONKLIN, being first duly sworn, testified before the Local United States Inspectors of Hulls and Boilers:

That he had been steamboating on Puget Sound for about twenty years and was familiar with the manner in which freight was handled on vessels of the type of the "Rubiayat." That on such vessels, they always load freight on the upper deck. That he was a stevedore on the "Rubiayat" and assisted in loading her. That the freight on the upper or toothpick deck, forward of the elevator consisted of canned goods loaded at Olympia, the amount of which he was unable to state. That when the vessel left Tacoma, her guards which are six inches wide, were quite a ways above the water; that it was dark at the time of leaving Tacoma and he could not say

(Testimony of Albert Conklin.)

exactly how much free-board she had. That after leaving, the witness was eating his supper when the vessel took a slight list to port, he was not alarmed but he became alarmed when she took a list to starboard and did not come back. That from his experience in loading these small boats, he had no opinion as to the cause of the accident; the vessel was not filled up and there was plenty of room for additional freight. The vessel had recently been in drydock and was not leaking; they had freight down in the hold and on the upper deck which ought to have kept her from being top heavy. That at the time she foundered, there was no shock of any kind. [57]

#### TESTIMONY OF HERMAN POLZIN.

HERMAN POLZIN, being first duly sworn, testified before the Local United States Inspectors of Hulls and Boilers:

That he had been boat stevedore on the "Rubiyat" since April 20th previous to the accident and has previously been stevedore on other boats of the same company and had been working as stevedore on small boats on Puget Sound for several years. That there was tonnage space below the upper deck for three or four hundred more sacks of cargo. The lower hold was filled. There was room to have put all cargo on the upper deck below the upper deck if they had wanted to; that the cargo was stowed both at Olympia and Tacoma under the directions of the master. I think we have often had more cargo in

(Testimony of Herman Polzin.)

weight on this vessel on previous trips but had never had as much gypsum. On this trip, she seemed to be a little bit heavier forward than aft. On previous trips she seemed to be a little more down aft. The cargo was well stowed and would not shift with ordinary rolling of the vessel, although it might have shifted when the vessel foundered. When the vessel left the dock at Tacoma, the witness did not feel alarmed as to the condition nor did he feel any alarm until after the first roll when she went over and foundered. It all happened very quick. It seemed right funny; she didn't act right. She first took a little list to starboard, came back to port and the next time she took a very severe list and tipped over, the water coming into the galley. The witness had no idea as to what caused her to founder. Can think of no other reason why she turned over other than being top-heavy. The vessel had about one foot free-board when she left Tacoma. The doors were all closed and while she had a heavy load, she had previously carried just as much heavy freight. From his previous experience with said vessel, he thought it was all right for her to carry freight on her upper deck. Above the upper [58] deck is the pilot-house, the captain's quarters, and the life-boats. It is a common practice to have the elevator platform even with the upper deck. The superstructure on this boat was pretty heavy but not any heavier than any of the other Sound boats. The lower hold was pretty well filled up with canned goods but a few truck-loads more might have been

(Testimony of George Joseph Ryan.)

loaded in the hold. The elevator was about fifteen feet wide and the space below the elevator, under the elevator shaft, there was no freight loaded in the hold.

#### TESTIMONY OF GEORGE JOSEPH RYAN.

GEORGE JOSEPH RYAN, being first duly sworn, testified before the United States Local Inspectors of Hulls and Boilers:

That he had been master of the "Rubiayat" for five and one-half months and had been master and deck-hand of the "Chaco" owned by the same people previous to that time. That on previous trips, it was a common thing to carry gypsum, but not as much as was aboard the "Rubiayat." Approximately 62 tons dead weight of gypsum was loaded on the "Rubiayat," the dead weight capacity of said vessel being about 130 tons. That upon leaving Olympia, the vessel had probably 58 tons dead weight of cargo, composed mostly of canned goods and about two tons of household goods, so that on leaving Tacoma, they had on board approximately 122 tons of cargo, consisting of canned goods, gypsum, and plaster. That on previous trips, the witness believed they had had just as much dead weight of cargo as on this trip. That upon leaving Tacoma, the draft of the vessel was about seven and one-half feet forward and eight and one-half feet aft. That would give her about six inches free-board from the main deck, which is about the maximum the vessel could be loaded with safety. He did

(Testimony of George Joseph Ryan.)

not believe she had ever been loaded so that [59] she had any less free-board. That she was deeper by the ports on this trip than on previous voyages; that about ten tons of cargo was left at Tacoma; the witness thought it perfectly safe to put these ten tons aboard but the men were tired and the rest was left until the next trip. That upon leaving the gypsum dock at Tacoma, there was probably space for thirty tons dead weight more cargo, figuring forty feet to the ton. That if this additional ten tons had been put aboard, the vessel would probably have been below her guards. The six inches free-board was below the guard. The guard itself being six inches would give her twelve inches free-board from the main-deck. The ports were all closed upon leaving Tacoma. The vessel had never previously had any freight damaged by salt water. Even though the vessel rolled, very little water would come through the ports and not enough to damage the cargo.

The witness further stated that he was at the wheel when the vessel left the dock at Tacoma; that she backed out from the dock, turned around, and headed up stream or up the waterway. That in making this maneuver, she showed no signs of tenderness or crankiness. The "Indianapolis" was coming right back of the "Rubiayat" and she showed no signs of crankiness in passing the "Indianapolis." The vessel steered all right upon leaving her dock and after turning around, she was hooked on.

(Testimony of George Joseph Ryan.)

He further testified that upon leaving Olympia, there were about twenty-one tons of canned goods in the lower hold; that the lower hold was about ninety per cent filled at said time; they probably could have put sixty or seventy-five more cases in the lower hold. In loading at Olympia and Tacoma, the vessel's freight elevator was used in handling the cargo. Upon leaving Tacoma, there was twenty-one tons of cargo in the hold and about 90½ tons on the main-deck and that on the upper [60] deck was ten and one-half tons of cargo forward of the elevator. That the elevator when not used in loading is kept up on the upper deck and furnishes a portion of said deck to walk on.

The witness further stated that he could not account for the capsizing. That in his opinion, it could not be ascribed to top-heaviness, as he had previously put fifteen tons of rock ballast alongside her keel and taken the water-tank down from the hurricane deck into the hold. That on leaving Tacoma, she had thirty-six tons dead weight in the lower hold; that is, twenty-one tons of cargo and fifteen tons of rock ballast. In addition she had her oil tanks containing probably forty tons of oil below the main-deck, and for this reason he thought she was stiff enough. That at the time of the accident, there was no sea and just a little northerly wind; they did not meet any vessel excepting the "Fulton" and the "Indianapolis" and that in taking the swell from the "Indianapolis," the "Rubiyat" stood up well.

(Testimony of Captain Ryan.)

The witness further stated that he had charge of stowing the cargo. That it was snugly stowed from wing to wing, with no possible chance of shifting.

Captain RYAN, recalled:

Upon being recalled, CAPTAIN RYAN testified before the United States Local Inspectors of Hulls and Boilers:

That after leaving the dock at Tacoma, he headed the vessel down the waterway; That before the accident he had cleared the waterway and shaped his course to Brown's point, the course being NW. b N.  $\frac{1}{2}$  N; that he first saw the steamer "Fulton" three to four hundred yards off the starboard bow; and the "Rubiayat" in passing out of the waterway seemed to make her course all right [61] and after passing out of the waterway and changing the course for Brown's Point, she steered all right up to the time he turned her wheel to change her course when she took a list to port and then listed over to starboard and went down by the head and over on her side. The bow seemed to go down first. He further testified that the vessel was in drydock in July previous to the accident; that she was scrapped and painted and some caulking done and he considered that her hull was in perfect condition when she left the drydock. The vessel did not leak any and the first indication of any accident was when she listed over on her side and took a small list to port and then gradually went over to starboard.

(Testimony of Captain Ryan.)

“Q. How do you account for the list, first to port and then to starboard?

A. Really it is hard to account for it. I had blown a starboard whistle by the ‘Fulton’ and brought the wheel over  $\frac{1}{2}$  a point. Was steering NW. by N. and brought her over to NW.  $\frac{1}{4}$  N. She then took a list to port.

Q. After you moved the wheel? A. Yes, sir.”

On many previous occasions he had made the same movement of the helm and she had taken a slight list and a large list and there had been crankiness more or less after putting the rocks in her. The rock ballast was put in on three different occasions and after this ballast was all in, she behaved better. This rock ballast was all forward beneath the elevator and forward underneath the floor along the keelson.

The witness further stated that he was unable to determine the cause of the vessel foundering, but that if he was loading her again with the same cargo, he does not believe he would put any on the upper deck. That above the upper deck are located the pilot-house, the captain’s room and the lifeboats and the top of the derrick also extends up quite a ways from the platform and the derrick platform is always carried on the upper deck and was up at the time of the accident. The only testimony by this witness before [62] United States Inspectors of Hulls and Boilers in regard to the passing of the “Indianapolis” was as follows:



(Testimony of Captain Ryan.)

“Q. Did you meet any vessel after you left the dock? A. Met the ‘Fulton.’

Q. Aside from the ‘Fulton’? A. No, sir.

Q. Any vessel make a swell?

A. The ‘Indian’ at that time.

Q. Stood up well? A. Yes, sir.

Q. Were you at the wheel when you left the dock? A. Yes, sir.

Q. Were you headed out when you left the dock?

A. Backed out from the dock.

Q. Then headed up stream? A. Yes, sir.

Q. In maneuvering—turning around—would you say that she was tender or cranky?

A. No signs of crankiness. The ‘Indian’ was coming right back to me and didn’t show signs of crankiness.”

That by the word “Indian,” he meant the S.S. “Indianapolis”; that in his testimony before the Inspectors he made no mention of tides or currents in the Tacoma Harbor. [63]

#### TESTIMONY OF FRANK E. LOVEJOY.

FRANK E. LOVEJOY, being first duly sworn, testified before the United States Local Inspectors of Hulls and Boilers:

That the “Rubiayat” had fifteen tons of rock ballast; that she was particularly built for this run; that he had had experience in designing and building boats of this type and practically designed this particular vessel. That he had worked with his father on five or six boats previous

(Testimony of Frank E. Lovejoy.)

to this as a draftsman and had had charge of finishing up and putting in the equipment of several steamers; that after this ballast was put in the "Rubiayat," he considered that she was safe to carry any reasonable load that might be placed on her.

"Q. After the ballast was put on was she sufficiently stiffened to carry the loads that she would be expected to carry?"

A. I figured that she was with a large margin of safety. She had run for at least two weeks without any ballast. The ballast was put in as a factor of safety. There were so many landings to be made where freight would be discharged that her stability would be retained even with no freight in the lower hold.

Q. Now, Captain, according to the testimony, we infer that if the cargo were properly distributed the vessel would still maintain at all times her proper stability. A. Yes, sir.

Q. That is fair? A. Yes, sir.

Q. So that apparently improper distribution of the cargo on this particular occasion was the cause of this accident? A. Probably a big factor.

Q. Have you any other reasons? In your opinion was there any other contributing factor, other than improper distribution of freight?

A. There was a meeting of strong cross-currents. Without having a sufficient margin of safety, such as the way the vessel was loaded, would be possibly another cause."

(Testimony of Frank E. Lovejoy.)

The witness further stated that he had been steamboating on Puget Sound for seventeen or eighteen years and had had a license either as master, pilot, or mate for fourteen years and was fairly familiar with the tidal and current conditions on the Sound, and that a boat has to be designed to meet these conditions [64] and that in this case, in designing the "Rubiayat" he had figured on cross-currents and adverse tidal conditions and if the boat was loaded with safety, she should meet these conditions. That up to the time of this accident, he had left the responsibility of proper loading with the master of the vessel and that his judgment appeared to be very good. That he had discussed with the master the stability of the vessel and the stowing of freight and that there was no definite limit ever spoken of and no definite instructions about the stowing of cargo given; that he had perfect confidence in the master, had previously sent for him to different ports on Puget Sound for loading and depended on his good judgment.

That by agreement of parties, Plaintiff's Exhibit 3 (same being a picture of the vessel) was admitted in evidence.

Defendant offered no further evidence and the case was thereupon argued by the attorneys for the respective parties and submitted to the court.

The Court took the case under advisement, and on July 16th, 1925, rendered an opinion.

Thereafter, and on July 24, 1925, findings of fact and conclusions of law were duly entered, with plaintiff's exceptions thereto made a part thereof. A judgment has been entered based on said findings of fact and conclusions of law.

CERTIFICATE OF JUDGE TO BILL OF EX-  
CEPTIONS.

And now, because the foregoing matters and things are not of record in this case, I, Jeremiah Neterer, District Judge and the Judge trying the above-entitled action in the District Court of the United States for the Northern Division of the Western District of Washington, do hereby certify that the foregoing bill of exceptions truly sets forth the proceedings had before me in the trial of the above-entitled action and contains a concise statement of [65] so much of the evidence and other matter as is necessary to explain the exceptions therein reserved and their relation to the case. The foregoing bill of exceptions shows the rulings of the Court on the questions of law arising at the trial and the exceptions taken and allowed thereto by the plaintiff. Said bill of exceptions was duly prepared and submitted within the time allowed by the rules of this court and is now signed and settled as and for the bill of exceptions in the above-entitled action and the same is ordered to be made a part of the record in said action.

Done in open court this 30th day of July, 1925.

JEREMIAH NETERER,

Judge.

Copy of attached plaintiff's proposed bill of exceptions received and due service thereof admitted upon July 25th, 1925.

SHORTS and DENNEY,  
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [66]

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[Title of Court and Cause.]

STIPULATION RE FORWARDING ORIGINAL  
EXHIBITS TO CIRCUIT COURT OF AP-  
PEALS FOR THE NINTH CIRCUIT.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that the original exhibits introduced by the parties to this action upon the trial of said cause be transmitted to the Circuit Court of Appeals for the Ninth Circuit.

BOGLE, BOGLE & HOLMAN,  
Attorneys for Plaintiff.  
SHORTS & DENNY,  
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [67]

[Title of Court and Cause.]

ORDER RE FORWARDING ORIGINAL EXHIBITS TO CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

On the stipulation of the parties, it is hereby ORDERED, that the original exhibits introduced by parties to this action upon the trial thereof be transmitted to the Circuit Court of Appeals for the Ninth Circuit.

Dated July 30, 1925.

JEREMIAH NETERER,  
Judge.

[Endorsed]: Filed Jul. 30, 1925. [68]

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[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the complete record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error to be perfected herein, and include in said transcript the following proceedings, papers, records and files, to wit:

1. Complaint.
2. Order of removal from Superior Court of Washington.
3. Answer.

4. Demurrer to answer.
5. Decision on demurrer.
6. Order overruling demurrer. Reply.
7. Stipulation waiving jury trial.
8. Findings of fact and conclusions of law, with exceptions thereto.
9. Judgment.
10. Bill of exceptions.
11. Petition for writ of error.
12. Assignments of error.
13. Order allowing writ of error and fixing bond.
14. Supersedeas bond and cost bond.
15. Writ of error.
16. Citation on writ of error.
17. Stipulation and order as to original exhibits.
18. This praecipe, and any and all records, entries, minutes, orders, papers, proceedings, and files necessary or proper to make a complete transcript of the record of said cause in said District Court, as required by law and the rules of this court and those of the United States Circuit Court of Appeals for the Ninth Circuit.

BOGLE, BOGLE & HOLMAN,  
Attorneys for Plaintiff.

Due and sufficient service by copy of the foregoing praecipe is acknowledged this 30 day of July, 1925.

SHORTS and DENNEY,  
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [69]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD.

United States of America,  
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 69, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing-entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [70]

Clerk's fees (Act February 11, 1925) for making record, certificate or return, 170 folios  
at 15¢.....\$25.50



Certificate of Clerk to transcript of record with seal.....	.50
Certificate of Clerk to original exhibits, with seal.....	.50
Total.....	\$26.50

I hereby certify that the above cost for preparing and certifying record, amounting to \$26.50, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and citation on writ of error issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 26th day of August, 1925.

[Seal] ED. M. LAKIN,  
Clerk United States District Court, Western District of Washington.

By S. M. H. Cook,  
Deputy. [71]

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[Title of Court and Cause.]

### WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Judges of the District Court of the United States for the Northern Division of the Western District of Washington, GREETING:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is

in the said District Court before the Honorable Jeremiah Neterer, one of you, between Olympia Canning Company, a corporation, plaintiff, and plaintiff in error, and The Union Marine Insurance Company, Ltd., a corporation, defendant, and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by petition doth appear, and we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do hereby command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in San Francisco, California, within thirty days from the date hereof, to be then and there held; that the records and proceedings aforesaid being then and there exhibited, the [72] said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS, the Honorable WILLIAM H. TAFT,  
Chief Justice of the Supreme Court of the United  
States, this 30th day of July, 1925.

[Seal] ED. M. LAKIN,  
Clerk of the District Court of the United States for  
the Northern Division of the Western District  
of Washington.

By S. E. Leitch,  
Deputy.

The foregoing writ of error was duly served upon  
the District Court of the United States for the  
Northern Division of the Western District of Wash-  
ington, by filing a copy thereof with me, as the Clerk  
of said court, on this 30th day of July, 1925.

ED. M. LAKIN,  
Clerk of the United States District Court for the  
Northern Division of the Western District of  
Washington.

By S. E. Leitch,  
Deputy.

Due and sufficient service by copy of the foregoing  
writ of error is acknowledged this 30th day of July,  
1925.

SHORTS and DENNY,  
Attorneys for Defendant. [73]

[Endorsed]: Filed Jul. 30, 1925. [74]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

United States of America,

Western District of Washington,—ss.

To the Union Marine Insurance Company, Ltd., a  
Corporation, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Northern Division of the Western District of Washington, in a cause wherein Olympia Canning Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Seattle, Washington, in said District, this 30 day of July, 1925.

[Seal]

JEREMIAH NETERER,

Judge.

Due and legal service of the within citation is hereby accepted, this 30th day of July, 1925.

SHORTS and DENNEY,

Attorneys for Defendant in Error. [75]

[Endorsed]: Filed Jul. 30, 1925. [76]

[Endorsed]: No. 4679. United States Circuit Court of Appeals for the Ninth Circuit. Olympia Canning Company, a Corporation, Plaintiff in Error, vs. The Union Marine Insurance, Ltd., a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed August 28, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

